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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

BEVERLY SIMPSON, as Successor in Interest, etc., et al., Plaintiffs and Respondents, v. THC ORANGE COUNTY, INC., Defendant and Appellant.	C086042 (Super. Ct. No. 34-2017-00210287-CU-PO-GDS)

Matthew Simpson, a 42-year-old quadriplegic, was admitted to Kindred Hospital. In the process, Matthew's mother, Marjorie Simpson, signed an admissions agreement and an alternative dispute resolution (ADR) agreement. Subsequently, plaintiff Beverly Simpson, Matthew's sister and successor in interest, filed suit against THC Orange County, Inc., dba Kindred Hospital San Francisco Bay Area (Kindred Hospital) following

Matthew's death.[1] Kindred Hospital filed a petition to compel arbitration. The court denied the petition, finding there was no valid ADR agreement since Matthew never signed the agreement and there was no evidence Marjorie had power of attorney over her son. Kindred Hospital appeals, contending the ADR agreement is enforceable. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2015 Matthew's mother, Marjorie, executed an admissions agreement and an ADR agreement as part of the admissions process at Kindred Hospital.[2] The ADR agreement states: "Signing this agreement is not a precondition to the furnishing of services by Kindred Long-Term Acute Care Hospitals."

The arbitration provision in the ADR agreement provides that: "[A]ny dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration."

Article III of the ADR agreement states that: "In addition to covering the kinds of claims referred to in Articles I and II, this ADR agreement applies to any legal claim or

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[1] To avoid confusion, we refer to the parties by their first names. No disrespect is intended.

[2] The admissions documents signed by Marjorie included an admissions agreement, advance directives, notice of privacy practices, request for insurance policy/letter of coverage, designation of individuals allowed to receive updates, valuables statement, Paul Gann Blood Safety Act, patient belongings list, and informed consent for PICC insertion form.

civil action arising out of or relating to your hospitalization, outpatient service, or any service rendered under Kindred's Admission Agreement, which is incorporated herein by this reference, (e.g. claims for . . . elder abuse . . .)." That section also provides that the "ADR agreement also covers any claim or action brought by a party other than you (e.g. an action by your spouse, legal representative, agent, heir) arising out of or relating to your hospitalization or outpatient service against the hospital or its employees."

Matthew, 42 years old and a quadriplegic, did not sign the ADR agreement. Marjorie signed the ADR agreement as Matthew's "Legal Representative." Above her signature the agreement states that "[b]y virtue of the Patient's consent, instruction and/or durable power of attorney, I hereby certify that I am authorized to act as Patient's agent in executing and delivering this Agreement." The agreement also states that if Marjorie signed as a "Legal Representative" "that the Facility may reasonably rely upon the validity and authority of the representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the patient."

Above the signature line, the ADR agreement states: "Notice: by signing this contract you are agreeing to have any issue of medical malpractice decided by neutral arbitration and you are giving up your right to a jury or court trial. See article I of this contract."

In April 2017 Beverly filed suit individually and as successor in interest to Matthew alleging various causes of action stemming from Matthew's death. Kindred Hospital responded, citing the ADR agreement and demanding Beverly dismiss the lawsuit and proceed pursuant to the ADR agreement. Kindred Hospital later renewed their demand that Beverly submit her claim to ADR under the ADR agreement. Subsequently, Kindred Hospital filed a petition to compel arbitration.

Following oral argument, the trial court denied the petition. The court found the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) did not apply because Matthew never signed the ADR agreement and there was no evidence Marjorie had power of

attorney over her son. According to the court, the title "Legal Representative" had no meaning in this context, and Kindred Hospital's arguments on equitable estoppel and third party beneficiary were unpersuasive. Kindred Hospital filed a timely notice of appeal.

DISCUSSION

I

We review an order denying a petition to compel arbitration, when the court's denial rests solely on a decision of law, de novo. When the denial is based on a decision of fact, we employ the substantial evidence standard. (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.) A party seeking to compel arbitration bears the burden of proving that the agreement was signed either by the party to be bound or by a person who had the authority to act on behalf of that party. (*Goldman v. Sunbridge Healthcare, LLC* (2013) 220 Cal.App.4th 1160, 1173 (*Goldman*); *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1128, 1133-1134.)

II

The trial court considered the facts and law surrounding the ADR agreement in question and found Kindred Hospital failed to meet this burden. Kindred Hospital argued Beverly was bound by the agreement because Marjorie signed it as a "Legal Representative" and the facility relied on Marjorie's representations that she possessed the requisite authority. Kindred Hospital renews this argument on appeal.

As the trial court pointed out, the fact that Marjorie signed the ADR agreement as a "Legal Representative" and that Kindred Hospital relied on her representations is insufficient. " '[A]gency cannot be created by the conduct of the agent alone; rather, *conduct by the principal* is essential to create the agency.' " (*Goldman, supra*, 220 Cal.App.4th at p. 1173.)

Kindred Hospital presents no evidence of conduct by Marjorie, such as the execution of a power of attorney, that created an agency relationship with Matthew. Instead, Kindred Hospital argues this ignores "the fact that [Matthew] allowed his mother to act on his behalf as his agent in executing multiple contracts and consents for medical treatment during his admission to Kindred Hospital. Indeed, if [Matthew] did not authorize his mother to act on his behalf, he would not have allowed her to sign the agreements related to his medical care or permit the corresponding medical treatment."[3]

Mother's familial relationship, while perhaps sufficient to provide authority to make medical decisions, is not enough to authorize decisions on arbitration. In *Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, the court determined that the "mere fact [the husband] signed the admission documents [for the wife's admission to a skilled nursing facility] including the arbitration agreements, is insufficient." (*Id.* at p. 588.) In *Flores*, Josephina Flores was admitted to a nursing facility with a dementia diagnosis. Her husband signed various admission documents, including two arbitration agreements. (*Id.* at pp. 585-586.) The court held: "Although the Legislature has specifically conveyed authority over medical decisionmaking and enforcement of rights to family members, it has not conveyed authority over the arbitration decision to family members. We view this as a significant omission, and accordingly conclude that there is no statutory authorization for a person to agree to arbitration based solely on a familial relationship with the patient." (*Id.* at p. 590.) Only "a person who is authorized to act as the patient's agent can bind the patient to an arbitration agreement." (*Id.* at p. 587.)

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3 The trial court noted that Beverly, in opposing the motion to compel arbitration, pointed out that "[Matthew] was 42 years old and while rendered quadriplegic as a result of a work accident, there is no evidence that he would have been prevented from executing such an agreement, for example, by executing an X on the document."

Here, Kindred Hospital produced no evidence that Matthew agreed to have Marjorie sign the ADR agreement, or any evidence that Matthew conveyed a reasonable belief that Marjorie was authorized to sign the agreement as his agent. As a result, Kindred Hospital fails to meet its burden of establishing that Matthew agreed to arbitrate any claims and thus fails to show Matthew is bound by the ADR agreement.

III

The trial court considered Kindred Hospital's contention that the FAA governs the enforceability of the ADR agreement and compels its enforcement in the present case. The court found the argument unpersuasive since no valid ADR agreement was ever formed in the first place given Marjorie's lack of authority to sign the agreement on Matthew's behalf.

The court explained that the FAA only precludes application of state law rules that conflict with the FAA or frustrate its purpose to ensure the arbitration agreements " 'are enforced according to their terms.' " (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 344 [131 S.Ct. 1740, 1748].) In *Concepcion*, the Supreme Court held that the FAA preserves "generally applicable contract defenses," for example, whether a contract was formed in the first instance. (*Id.* at pp. 343-351.) Therefore, the trial court concluded: "That the FAA applies to the ADR Agreement has no bearing on the Court's analysis above that no agreement to arbitrate between the Decedent and Kindred was formed in the first instance."

Kindred Hospital also argues the trial court erred in failing to interpret the ADR agreement under the FAA. According to Kindred Hospital, the court relied on *Goldman, supra*, 220 Cal.App.4th 1160, and other California authority, which are preempted by the FAA. In support, Kindred Hospital cites the United States Supreme Court decision in *Kindred Nursing Centers L.P. v. Clark* (2017) 581 U.S. ___ [137 S.Ct. 1421] (*Kindred*).

However, we do not find any such preemption. In *Kindred* the United States Supreme Court considered the Kentucky Supreme Court's ruling refusing to enforce two arbitration agreements entered into by individuals with power of attorney for a third party. The Kentucky Supreme Court announced a "clear-statement" rule (*Kindred, supra*, 137 S.Ct. at p. 1426) holding that a power of attorney could not authorize a legal representative to enter into an arbitration agreement for a third party unless the representative had specific authority to " 'waive his principal's fundamental constitutional rights to access to the courts [and] to trial by jury.' " (*Id.* at p. 1425.)

The Supreme Court held that the clear-statement rule singled out arbitration agreements for disfavored treatment and violated the FAA. (*Kindred, supra*, 137 S.Ct. at p. 1425.) The clear-statement rule also failed to put arbitration agreements on an equal plane with other contracts. (*Id.* at p. 1427.) The Kentucky Supreme Court had impermissibly adopted a "legal rule hinging on the primary characteristic of an arbitration agreement—namely a waiver of the right to go to court and receive a jury trial." (*Ibid.*) The Supreme Court noted that the clear-statement rule did not appear to apply to other kinds of agreements giving up the right to go to court or to request a jury trial and thus arose from the status of arbitration and singled out arbitration agreements for disfavored treatment. The Supreme Court stated that a decision that a power of attorney was insufficiently broad enough to give an individual the authority to execute the arbitration may still be proper if it was completely independent of the clear-statement rule. (*Id.* at p. 1429.)

Kindred reaffirmed *Concepcion*'s finding that a court may refuse to enforce an arbitration agreement based on " 'generally applicable contract defenses' " but not on "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.' [Citation.]" (*Kindred, supra*, 137 S.Ct. at p. 1426.)

Kindred does not overrule *Goldman*'s holding that the party compelling arbitration has the burden of proving the arbitration agreement must be signed by either the party to

be bound, or by a person possessing the authority to act on behalf of that party. The holding does not fail to put "arbitration agreements on an equal plane with other contracts." (*Kindred, supra*, 137 S.Ct. at p. 1427.) Instead, as the trial court noted, consideration of Marjorie's authority to bind Matthew to the agreement "does not hinge on characteristics of an arbitration agreement but instead on generally applicable principles of agency and contract law, that is, whether a valid contract was formed in the first interest when a third party purports to sign the contract on another's behalf." A finding that Beverly, as Matthew's successor in interest, is not bound by the ADR agreement because there is no evidence that Marjorie was authorized to act as Matthew's agent does not single out arbitration agreements based on the characteristics of arbitration and is therefore not preempted by the FAA.

IV

Kindred Hospital contends that although Matthew did not sign the ADR agreement, it can enforce the agreement under either the doctrine of equitable estoppel or third party beneficiary doctrine. We are not persuaded.

"Generally speaking, one must be a party to an arbitration agreement to be bound by it or invoke it." (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.) However, under equitable estoppel, a signatory party can compel a nonsignatory party to arbitration if the claims are "based upon and intertwined" with the underlying contract obligations. The rule prevents parties from "trifling" with their contractual obligations. (*Turtle Ridge Media Group, Inc. v. Pacific Bell Directory* (2006) 140 Cal.App.4th 828, 833.)

In support, Kindred Hospital cites cases in which a signatory plaintiff's claims against nonsignatory defendants are inextricably intertwined or bound up with the contractual obligations imposed by the contract signed by the plaintiff and the signatory defendants. Under these circumstances, the defendants who are not a signatory to the

agreements containing an arbitration clause may enforce the arbitration clause against the signatory plaintiff. (*JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1239-1240.) Here, however, there is no evidence that an agreement to arbitrate was formed in the first instance between Matthew and Kindred Hospital.

Kindred Hospital presents a brief claim that the doctrine of third party beneficiary compels the court to grant arbitration. However, Matthew cannot be a third party beneficiary when there is no evidence Marjorie had any authority to execute the underlying ADR agreement.

DISPOSITION

The judgment is affirmed. Beverly Simpson shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/
RAYE, P. J.

We concur:

/s/
HOCH, J.

/s/
RENNER, J.